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# In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-6829

PETITION NOT PRINTED

ARTHUR A. GAUTHIER,
PETITIONER,

*v.*

COMMONWEALTH OF MASSACHUSETTS,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

## BRIEF FOR THE COMMONWEALTH OF MASSACHUSETTS IN OPPOSITION

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### Statement of the Case

Petitioner and three co-defendants were tried in 1955 before a judge and jury in the Superior Court for Essex County, Massachusetts, on indictments charging each with murder in the second degree, robbery, and conspiracy. The charges arose out of a violent robbery, during the commis-

sion of which and after which the victim was brutally kicked and beaten. The victim died as a result of wounds inflicted in these attacks. *Commonwealth* v. *Gauthier*, 1972 Mass. Adv. Sh. 553, n. 1.[1] Three defendants, including petitioner, were convicted as charged, while one was acquitted on the murder charge but convicted on the other charges. The trial and conviction occurred in February of 1955 — eight years before this Court's opinions in *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), and *Douglas* v. *California*, 372 U.S. 353 (1963).

Petitioner was represented at trial by privately retained counsel. His trial attorney was expressly acknowledged by the Massachusetts Supreme Judicial Court to have been a capable trial lawyer (1972 Mass. Adv. Sh. at 554) (Brief for Petitioner A3). Petitioner was also assisted by other privately retained counsel. Following conviction, counsel informed petitioner that he had a right to appeal, but that they would no longer represent him. While his three co-defendants did take direct appeals, petitioner did not — apparently because he and his attorneys had concluded that an appeal would be fruitless (1972 Mass. Adv. Sh. at 555) (Brief for Petitioner A3). On appeal, the convictions of his co-defendants were affirmed by the Massachusetts Supreme Judicial Court. *Commonwealth* v. *Beaulieu*, 333 Mass. 640, *cert. denied sub nom. Weaver* v. *Massachusetts*, 351 U.S. 957 (1956) and *Boisvert* v. *Massachusetts*, 352 U.S. 857 (1956). Petitioner did not request court-appointed counsel, and the record does not indicate that any state official knew of petitioner's indigency or of any desire on his part to appeal. Nevertheless, in November of 1969 (nearly fifteen years after the trial), petitioner filed a motion for a new trial, pursuant to Mass. Gen. Laws, ch. 278, §29. In this motion, petitioner alleged that he had

[1] A copy of the report of this case is attached to the brief for petitioner as Appendix A.

been deprived of his right to appeal, due to failure on the part of his counsel and the trial judge to specifically inform him of a right, if indigent, to court-appointed appellate counsel. Following a hearing, the motion was denied, and petitioner appealed under Mass. Gen. Laws, ch. 278, §§33 A-G. The Supreme Judicial Court affirmed. (1972 Mass. Adv. Sh. 553) (Brief for Petitioner Appendix A).

In affirming the denial of petitioner's motion for a new trial, the Supreme Judicial Court emphasized that petitioner had been represented at trial by retained and capable counsel. The Court concluded that the Commonwealth was therefore justified in presuming that the counsel selected by the defendant was adequately protecting his rights, in the absence of events which would have placed the Commonwealth on notice to the contrary. (1972 Mass. Adv. Sh. at 558-559) (Brief for Petitioner pp. A7-A9). Since the Commonwealth was not chargeable with such notice, the Court concluded that any failure on the part of petitioner's trial counsel was not state action depriving petitioner of due process or equal protection. Consequently, there was no duty on the part of the trial judge to inform petitioner of the right, if indigent, to court-appointed appellate counsel (1972 Mass. Adv. Sh. at 558-559) (Brief for Petitioner pp. A8-A9).

## Argument

I. The Petition Fails To Raise a Substantial Federal Question and Is, Therefore, Jurisdictionally Insufficient.

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. §1257 (3). A prerequisite of the discretionary review which he seeks is a showing that a substantial federal question has been properly raised in the state court

proceedings. *Zucht* v. *King*, 260 U.S. 174, 176 (1922). It is respondent's position that this case does not involve a substantial federal question, in that petitioner has not indicated *state* deprivation of rights guaranteed by the Fourteenth Amendment.

Petitioner contends that he has been deprived of rights to due process of law and equal protection of the laws guaranteed by the Fourteenth Amendment. In particular, he contends that a convicted defendant, who was represented by privately retained trial counsel, is *ipso facto* entitled to a *new trial* where he can show that he was indigent at the time for taking an appeal and that he was not advised by counsel or the court of a right to appellate counsel at state expense, if indigent. In making this contention, petitioner alleges that: "Before, during, and after the trial, I was indigent and was unaware that I was entitled to the assistance of counsel upon appeal" (Petitioner's affidavit in support of motion for leave to proceed *in forma pauperis*). He further argues that while counsel informed him of his right to appeal, they did not inform him of the right to court-appointed counsel for purposes of said appeal. However, at no point does he indicate actual *state* deprivation of rights guaranteed by the Fourteenth Amendment. Such state action is essential if he is to obtain the post-conviction relief which he seeks.

> It is not enough to show that indigency occasioned the petitioner's inability to employ counsel or to appeal; the petitioner must show that the *State* deprived him of his Fourteenth Amendment rights. *Pate* v. *Holman*, 341 F.2d 764, 775 (5th Cir. 1965), *modified*, 343 F.2d 546 (5th Cir. 1965).

Where, as is here the case, an accused appears at trial with privately retained counsel and does not challenge the

competence of that counsel, the state may properly assume that the accused's counsel will adequately protect his rights, although this assumption is rebuttable. 341 F.2d at 775. Moreover, "the very nature of the private attorney-client relationship, brought into existence by the deliberate choice of the defendant . . ." requires that this fundamental assumption be made. *United States ex rel. O'Brien* v. *Maroney,* 423 F.2d 865, 869 (3rd Cir. 1970). Unless a court is to assume the worst of privately retained defense counsel, it ought not conduct the sort of across-the-board inquiry which petitioner proposes. Thus, the position taken by the Fifth Circuit is that:

> . . . when a defendant has retained counsel of his own choosing the State cannot be held to have violated the constitutional right of an indigent to counsel on appeal, unless the need for appellate counsel is brought home to the State, either by the defendant's request for appellate counsel or because a responsible State official has actual knowledge that the defendant is indigent and desires to appeal his conviction. 341 F.2d at 773.

The Third Circuit also adheres to this view. 423 F.2d at 869-70. Similarly, this Court has recognized that where an accused has retained counsel, warnings which would be required in the absence of counsel need not necessarily be given. Thus, in *Miranda* v. *Arizona,* 384 U.S. 436 (1966), this Court held that before custodially interrogating a suspect, the police must make known to him that he is entitled to a lawyer and that if he is indigent, a lawyer will be provided. However, in so holding, this Court added the qualifying statement that:

> A warning that the indigent may have counsel appointed need not be given to the person who is known

> to have an attorney or is known to have ample funds to secure one . . . 384 U.S. at 473, n. 43.

In other words, some event must first occur to place the state on notice that an accused, who appeared at trial with privately retained counsel, nevertheless requires the assistance of appellate counsel appointed by the court. Such an event occured in *Douglas* v. *California*, *supra*, upon which petitioner puts misplaced reliance. This Court stated therein:

> The record shows that petitioners requested, and were denied, the assistance of counsel on appeal, even though it plainly appeared they were indigents. 372 U.S. at 354.

Similar events occurred in *Griffin* v. *Illinois*, 351 U.S. 12 (1956), also relied upon by petitioner. Petitioners in *Griffin* had, immediately after their conviction, filed a motion in the trial court requesting a free trial transcript and stating, in support of the motion, that they were indigents. 351 U.S. at 13. In *Carnley* v. *Cochran*, 369 U.S. 506 (1962), also cited by petitioner, the petitioner was tried without defense counsel, which necessarily placed the trial court on notice of his probable indigency. Since the record did not reveal an affirmative waiver by him of the right to defense counsel, and since this Court concluded that "the constitutional infirmity of trial without counsel is manifest," 369 U.S. at 517, this Court held that the petitioner had been deprived of rights guaranteed by the Fourteenth Amendment. *Id.* at 513-17. In *Swenson* v. *Bosler*, 386 U.S. 258 (1967), also cited by petitioner in the present case, this Court struck down a state appellate practice under which no provision was made for the appointment of appellate counsel for indigent defendants. The case involved events which made it

apparent that the defendant was both indigent and desired to appeal. *Id.* at 259-60.

When so viewed, the above cases do not support petitioner's contention that state trial courts should deliver an across-the-board warning to all convicted defendants of the right, if indigent, to court-appointed appellate counsel. Rather, they indicate that before any such obligation will attach (assuming that there is such a duty), the need for court-appointed counsel must first be made known to the state, whether by express request or implied notice. Since no such express or implied notice is here involved, the following statement by Judge Friendly, dissenting in *United States ex rel. Smith* v. *McMann*, 417 F.2d 648 (2d Cir. 1969), *cert. denied*, 397 U.S. 925 (1970), seems particularly appropriate:

> . . . I see no justification for holding that in 1959 New York should have perceived a constitutional duty on its part to make certain that a convicted defendant whom it had no reason to believe to be indigent should be advised what New York would do for him if he were.... I find it especially hard to condemn New York for inaction in 1959, when it was not until 1966 that the Supreme Court brought its own rule governing federal criminal appeals in line with what the majority holds to have been constitutionally required all along. 417 F.2d at 658-59.

The majority in *McMann* was of the contrary opinion that *Douglas* v. *California* does impose such a constitutional duty.

> We think the only practical, logical and fair interpretation to be given to *Douglas* v. *California* is that it imposes upon the state a duty to warn every person

> convicted of crime of his right to appeal and his right to prosecute his appeal without expense to him by counsel appointed by the state, if he is indigent. 417 F.2d at 654.

Petitioner argues that the Massachusetts Supreme Judicial Court, in rejecting his arguments for a new trial, has taken a position inconsistent with that adopted by the Second Circuit in *McMann*. While it is true that the Supreme Judicial Court rejected the broad interpretation of *Douglas* given by the Second Circuit, it is also true that the court was faced with an altogether different question. In *McMann*, the question was whether the failure to inform a defendant having retained counsel of the right, if indigent, to court-appointed appellate counsel entitled him to *take an appeal*, despite his failure to perfect an appeal within statutory time limits. In the present case, the question is whether a convicted defendant, given a similar fact situation, is entitled not only to an appeal but to an altogether new trial. In *McMann*, the Second Circuit was careful to distinguish between the two situations:

> Our holding does not require that a verdict be upset for failure to warn, but only that the state should allow the completion of appellate review, with counsel if a prisoner so desires. If an appeal is taken and material trial error is found by a state appellate court, there may be a new trial required with the familiar difficulties of proof long after the event. But that is only if the state courts find that the conviction on which the imprisonment was based was wrong in the first place. 417 F.2d at 655.

Petitioner would have this Court, in effect, disregard the limitation which the Second Circuit expressly placed

upon its holding, and apply the Second Circuit's construction of *Douglas* to his own case. The ramifications of such an application would, to say the least, be far reaching. It should again be noted that petitioner was tried and convicted eight years before this Court's opinion in *Douglas v. California,* and that nearly fifteen years passed before petitioner initiated the present action for a new trial. Thus, petitioner's argument, if accepted, would have direct bearing upon *any* pre-*Douglas* criminal prosecution in which a convicted accused did not take a direct appeal and was not specifically informed by either counsel or the court of the right, if indigent, to court-appointed appellate counsel — a right which would not become expressly obligatory upon the states until much later. It is respondent's position that the allegation of *state* action which petitioner makes is much too attenuated to justify so far reaching a result. Petitioner appeared at trial with retained and capable counsel. No event occurred which would have placed the state on notice that petitioner was indigent or desired to appeal. Consequently, the state did not deprive petitioner of due process and equal protection when making the justified assumption that petitioner was receiving adequate representation. The question raised by this petition has thus been artificially framed as a federal question, in that state deprivation of rights arising under the Fourteenth Amendment is not here involved.

II. If a Federal Question Does Exist, the Resolution of the Question Is Not Appropriate in the Present Case.

Petitioner was tried and convicted in 1955. He was represented at trial by privately retained and capable counsel, and no events occurred which would have made the state chargeable with notice of the petitioner's need and

desire, if any, for court-appointed appellate counsel. While petitioner did not appeal, his co-defendants did. This latter fact must have been noted by petitioner. It was a factor stressed by the Second Circuit in *McMann,* when remanding that case for determination of whether petitioner Smith knew of his right to appeal at no expense to himself:

> [A]ppellant's credibility was at issue and he knew that a co-defendant with assigned counsel was taking an appeal. 417 F.2d at 656.

Petitioner's decision not to appeal was apparently made only after petitioner and his counsel concluded that an appeal would be fruitless. Thus, the trial court in the present proceeding was prompted to remark:

> the defendant in testifying he was not properly and fully advised regarding his rights of appeal by his original counsel, Attorney John R. Murphy, deliberately and intentionally lied to this court . . . [T]he defendant must have been completely aware of the appeals being taken by his pals, the co-defendants, and hence knew all he needed to know if indeed he ever intended or wanted to appeal. The blunt truth of the matter is that he and his attorney had concluded that an appeal, if taken, would be fruitless. (1972 Mass. Adv. Sh. at 555). (Brief for Petitioner p. A3).

This conclusion was borne out by the fact that on appeal, the judgments against petitioner's co-defendants were affirmed.

Despite the above considerations, petitioner in 1969 brought the present action for a new trial. Nearly fifteen years had by then elapsed since his trial and conviction

for a brutal murder and robbery. Nevertheless, he argues that due process and equal protection entitle him to an altogether new trial, with the state confronting all the problems of proving guilt long after the events upon which the conviction was based. Respondent suggests that if the petition now before this Court raises a federal question, the resolution of this question would not be appropriate in the circumstances of this case. Respondent suggests that it would be sound judicial policy for this Court to refrain from exercising its discretionary certiorari power with respect to this case.

III. If a Federal Question Does Exist, the Question May Be Better Phrased To Reflect the Special Facts of the Case.

In framing the question, petitioner has failed to distinguish between the remedy which he seeks (a new trial) and the relief sought by petitioner Smith in *McMann* (appellate review). Respondent suggests that the issue presented to the Supreme Judicial Court of Massachusetts, and, hence, the issue now presented to this Court, should be phrased so as to reflect this distinction. Respondent suggests that the question may fairly be phrased:

> Whether due process of law or equal protection of the laws guaranteed by the Fourteenth Amendment entitle a defendant convicted of second degree murder and other felonies to a new trial where the defendant was represented at trial by privately retained counsel, where such counsel refused to represent the defendant beyond the verdicts, and where neither his retained counsel nor the trial judge specifically informed the defendant of the right, if indigent, to court-appointed appellate counsel.

## Conclusion

Briefly stated, respondent suggests that petitioner has not raised a substantial federal question, in that state action in violation of the Fourteenth Amendment is not in issue; that if a federal question does exist, resolution of the question would not be appropriate in the present case, and that if a federal question does exist, it may be better phrased to reflect the special facts of this case. Wherefore it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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